Testimony of Congressman Robert C. "Bobby" Scott
House Committee on Government Reform
Subcommittee on Criminal Justice, Drug Policy and Human Resources
Hearing entitled "Authorizing Presidential Vision:
Making Permanent the Efforts of the Faith-Based and Community Initiative"
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2154 Rayburn House Office Building

Good afternoon. Thank you Chairman Souder, Ranking Member Cummings, and distinguished Members of the subcommittee, for allowing me to testify before you on this very important subject.

I strongly believe that religious organizations can, do and should play an important and positive role in meeting our nation's social welfare needs. But there is a right way to partner government with religious organizations and a wrong way. Before we pass any legislation making permanent the faith-based and community initiative, we must ask – and receive a clear answer to – the question: how does the initiative change present law? To begin a response to this inquiry, I think we need to examine four very fundamental areas: (1) does the initiative allow government to directly fund a house of worship; (2) does the initiative permit a program using federal funds to proselytize during the government funded program; (3) does the initiative change the law to permit discrimination in employment using public funds; and (4) does the initiative change present law to permit the government to award funds in a manner that displays favoritism for a particular religious program over an objectively more qualified program run by a different religion or a secular organization? Until we answer these questions, we should not be making anything permanent.

Direct funding of a house of worship

The first question to ask is whether the initiative permits government to directly fund a house of worship, and if so, under what circumstances. This question must be asked from both a constitutional and a policy standpoint.

The controlling judicial authority on the constitutional constraints on government aid to religious institutions is the concurring opinion of Justice O'Connor in *Mitchell v. Helms.*[i] Justice O'Connor's concurrence, joined by Justice Breyer, represents the balance of power of the Court and is therefore the narrowest grounds upon which we must examine Establishment Clause jurisprudence.[2]

A reading of Justice O'Connor's concurrence makes clear that she specifically rejected the plurality's single-minded and exclusive focus on neutrality and disputed the plurality's contention that direct government aid to a pervasively sectarian institution is constitutionally acceptable: "we have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid ... I also disagree with the plurality's conclusion that actual diversion

of government aid to religious indoctrination is consistent with the Establishment Clause."[3]

In Justice O'Connor's view, a statute raises sensitive establishment clause concerns when it involves direct funding of religion. "In terms of public perception, a government program of direct aid to religious schools based on number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. . . This Court has recognized special Establishment Clause dangers where the government makes direct money grants to sectarian institutions."[4]

In cases such as this, Justice O'Connor will look at a range of factors, including, notably, the constitutional safeguards present, and the degree of entanglement between government and religion. In Justice O'Connor's own words, "the program [should] include adequate safeguards"[5] and the funds should not "create an excessive entanglement between government and religion."[6]

Under these tests, there is a very real concern that the faith-based initiative would fail to pass constitutional muster.

From a policy perspective, it is simply a bad idea to give direct funding to a house of worship. Under the President's initiative, religious institutions face a series of unintended, and unappealing, consequences as a result of being fed by the hand of government.

First, the government always regulates what it finances. This occurs because public officials are obligated to make certain that taxpayer funds are properly spent. Once churches are financed by the public, some of their freedom will be placed in jeopardy because regulation is certain to follow.

Second, the privacy of houses of worship will be open to government – and public – scrutiny. Church books will be subject to audit or face regular spot checks by federal inspectors in order to ensure appropriate accountability.

Third, government handouts will undermine the vitality of our churches and community members. Millions of Americans are active with their local churches and houses of worship, making special contributions as a way to strengthen their ties to their faith traditions and increase personal piety. Once religious institutions are working in tandem with the government and are receiving tax dollars to carry out their work and provide services to the less fortunate, members may feel that their assistance is no longer necessary, or they may be less inclined to "dig a little deeper" to help with church expenses.

Finally, the faith-based initiative threatens interfaith peace by pitting faith groups

against each other in competition for public funds. The synagogue a few miles away that offers counseling services is no longer a partner in your community involvement, but a competitor for funding and attention. And after the competition, what will the political ramifications be? For example, my city, Newport News, has a Jewish mayor. The Jewish population in my hometown is maybe two or three percent. What happens when you have a Baptist, an Episcopalian, a Jewish, and a secular group all competing for the same contract to run a federally funded social service program? If the vote happens to come down four to three for the Jewish group, just how ugly is the next campaign season going to become?

Proselytization

There seems to be relative consensus that public funds may not be used for inherently religious activities, such as worship, religious instruction and proselytization, and that participation in religious activities must be separate from the government sponsored program and must be voluntary on the part of beneficiaries. However, if this is the case, then it must be made clear. Promulgated regulations are ambiguous at best. For example, some agency regulations simply state that such activities, if offered, must be separate, "in time or location," and that they be "voluntary for the program beneficiaries."[7]

This language would allow an organization to compartmentalize the delivery of services into, for example, fifteen-minute increments of time, and to alternate between religious and non-religious segments of the program, or to immediately follow the provision of services with a religious element, without ever distinguishing between the two. Moreover, the regulations often do not require that a beneficiary be informed of his/her option to abstain from religious activities, and therefore a beneficiary is not likely to know that he/she does not have to remain or participate. These loopholes should be closed.

Employment Discrimination

Under Title VII, religious organizations may discriminate in positions paid for with their own money. The question here is whether that exemption ought to extend to positions paid for with federal funds for entirely secular purposes. While the Administration and Majority clearly read this extension into Title VII,[8] there is no legal authority for that position. In addition, the overwhelming evidence at hearings is that religious organizations do not need to discriminate in order to operate successful programs. The fact is that anything that can receive funding under charitable choice could already receive funding prior to charitable choice if it agreed to not discriminate. For decades, religiously motivated organizations have been funded like all other private organizations are funded: they had use the funds for the purpose for which they were appropriated; they were prohibited from using taxpayer money to advance their religious beliefs; and they were subject to laws that prohibit discrimination in employment.

People should not be taxed to provide employment for which they are ineligible on religious grounds. I do not agree with the notion that it somehow undermines religious institutions if they are asked to associate with people of other religions in doing various good works. When religious services or directly religious activities are being carried on, shared religion as a condition for certain forms of activity is clearly justified. But to argue that it would somehow undermine a particular religious group's sense of mission if it had to hire people of another religion for a secular service such as serving food, offering counseling, building housing, or doing maintenance services in a child care center, imputes to religions a narrowness of outlook which is unjustified and socially corrosive. Religious organizations are free to make employment decisions using religious criteria for programs run with their own money, but no citizen should have to pass someone else's religious test to qualify for a tax-funded job.

Furthermore, as Dr. Martin Luther King observed, the hour of worship is one of the most segregated hours in American society. This is sadly still true today. A law which by its silence is very likely to be interpreted as permitting religious discrimination in hiring will result in a great deal of racial discrimination as well. How many African Americans will be hired by Bob Jones University should they receive federal funds if employment is limited to the co-religionists of the recipient? How many white people will be employed as security guards in public housing by the Nation of Islam? And what of the many other religious organizations that are either overwhelmingly white or overwhelmingly black? We do not think that these groups should be empowered to hire only members of their own religion, which will in many cases also mean only members of their own race.

Consider also the extension of religious discrimination to gender discrimination. For example, a Catholic organization could claim religious exemption when it refuses to hire a single mother, whether due to divorce or premarital sex. An how will the organization know? Are we going to change privacy laws and allow employers to inquire into religious affiliation and levels of religious observance/adherence, marital and family status, etc.?

Several of the Administration and Majority attempts to further the faith-based initiative actually seek to roll back civil rights protections and statutes that are currently good law. The law of the land since shortly after the March on Washington has been that there is no discrimination with federal funds. The so-called "faith-based initiative" represents a profound change in policy.

Since 1965, if an employer had a problem hiring the best qualified applicant because of discrimination based on race or religion, that employer had a problem because the weight of the federal government was behind the victim of discrimination. But the faith-based initiative proposes to shift the weight of the federal government from supporting the victim to supporting the employer's so-called "right" to discriminate. That is a profound change in civil rights protection. And if we don't enforce discrimination laws in federal contracts, with secular programs, where is our moral authority to tell private employers, who may be devoutly religious, what they can do with their private money? A policy of religious discrimination in employment is wrong in the private sector; it is certainly wrong with federal funds.

There is no compelling reason to discriminate using federal funds other than that those seeking discrimination do not agree with the 1964 Civil Rights Act. If that is the case, then say so and let's revisit that piece of legislation, rather than taking it apart piece by piece through social programs and statutes. Employment discrimination is ugly. You can put lipstick on a pig, but you can't pass it off as a beauty queen. And you can dress up "We don't hire Catholics, Jews, and Hindus" with poll-tested semantics and euphemisms, but you can't pass it off as anything other than ugly discrimination.

Objective Merit

The fourth question that needs to be answered is whether the government is going to be giving out public funds based on objective merit, or whether it is going to exercise favoritism in handing out these funds and choose a particular religious organization to receive funds over an objectively more qualified program run by either a different religion or a secular organization. If favoritism is the case, then the government should say so. If not, then what is the change to current law?

Now there is no dispute that preferential support for one religion over another is clearly unconstitutional under the Establishment Clause.[9] So if favoritism is the purpose, then we need to change the Constitution. If the purpose of the initiative is not favoritism, then the government needs to lay out the objective criteria it uses to determine which programs should receive funding.

And then we need to go back and ask: if the purpose is not favoritism, well then what is it? Religious organizations were already receiving government funds for social service programs even without the faith-based initiative. So what is the purpose of the law? This is an elementary question that should be answered before we create and enact any law.

Vouchers

I'd like to briefly discuss the issue of vouchers. Based on recent court rulings, many of the constitutional arguments I have discussed in my testimony do not apply to vouchers. However, vouchers do create problems of their own.

The Supreme Court decision in *Zelman v. Simmons Harris,*[10] which allowed the use of vouchers at religious schools, established a strict set of requirements that must be met in order to find a voucher program constitutional. According to the Court, a voucher program must be completely neutral with respect to religion, use of vouchers at a religious institution must be a wholly genuine and independent private choice, the vouchers must pass directly through the hands of the beneficiaries, the voucher program must not provide incentives to choose a religious institution over a non-religious one, there must be genuine and legitimate secular options, and there must be a secular purpose for the voucher program.[11] Therefore, any voucher program

established by the government for social service programs must satisfy these criteria. And voucher programs would need to be limited to those areas in which wide-ranging secular options are available. Furthermore, beneficiaries should be notified of their options.

Administrative concerns are also raised by vouchers programs. One main concern is that under a voucher program, there is no way to ensure availability of services. Absent a direct funding stream to a particular organization, it is impossible to make certain that a particular type of service will be offered in any given area. Another concern is that vouchers jeopardize the financial stability of both religious and secular non-profit agencies by replacing the more reliable grant and contract funding they receive with unpredictable voucher funding. Finally, it is difficult to provide quality control over all of the programs that may want to partner with government. Quality control is necessary both to ensure that the public funds are being used for the purpose for which they were distributed and to ensure that those using the vouchers are receiving quality services.

Conclusion

Faith based organizations have been receiving government funding for social service programs for decades. It is true that there are many faith based organizations that are too small to have the administrative infrastructure to handle the logistics of partnering with government, but this is not unique to religious organizations; this is equally true of small, secular community organizations. If the government wants to better equip such organizations to partner with government in the provision of social services, then we need to figure out the best way to provide outreach and technical assistance to all such organizations, or we should use a community action agency structure to administer programs in partnership with local religious and community organizations. But the faith-based initiative in its current form is not the answer.

Finally, it is difficult to support legislation which purports to provide an enhanced ability to provide social services to those in need when the legislation itself does not authorize a single dollar in additional funds for social service programs. This fact, when combined with the severe cuts in the Administration's budget for social services, will place severe constraints on the ultimate viability of charitable choice programs. It is indeed ironic that at the same time the Administration and the Majority are touting to this country a commitment to values, the need for compassion and the benefit of making the faith-based initiative permanent, they have elected to slash the budgets of the very programs that are necessary to promote the welfare of the American people. Rather than cutting funds across the board and laying the responsibility on a few community churches, the government ought to focus on funding for everybody.

Thank you again for permitting me to testify before you. I would like to request that my full testimony be admitted for the record. And I would be happy to answer any questions you might have.

i. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

2. The Justices in *Mitchell v. Helms*, 530 U.S. 793 (2000) joined in three different opinions. Justice Thomas wrote the plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Helms v. Mitchell, *supr*a, at 801 (Thomas, J., plurality opinion). Justice Souter, joined by Justices Stevens and Ginsburg, wrote a dissent. *Id.* at 868 (Souter, J., dissenting). Justice O'Connor, joined by Justice Breyer, wrote the determinative opinion in the case and the one that provides the most authoritative guidance on the current meaning of the establishment clause. *Id.* at 836 (O'Connor, J., concurring).

3. *Mitchell v. Helms*, 530 U.S. 793, 840 (O'Connor, J., concurring).

4. *Id.* at 842, 843.

5. *Id.* at 687.

6. *Id.* at 845.

7. *See e.g.,* Charitable Choice Provisions and Regulations; Final Rules, 68 Fed. Reg. 56430, 56444, 56446-7 (Sept. 30, 2003) (codified at 42 C.F.R. pts. 54, 54a and 45 C.F.R. pts. 96, 260, 1050); Charitable Choice Provisions Applicable to Programs Authorized Under the Community Services Block Grant, 68 Fed. Reg. 56466, 56470 (Sept. 30, 2003) (codified at 45 C.F.R. pt. 1050); Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program (68 Fed. Reg. 56449, 56465 (Sept. 30, 2003) (codified at 45 C.F.R. pt. 260).

8. *See, e.g.*, Department of Justice memorandum dated June 26, 2001 ("We conclude, for the reasons set forth more fully below, that an FBO receiving direct federal aid may make employment decisions on the basis of religion without running afoul of the Establishment Clause, and that an FBO organized under section 501(c)(3) may invoke the title VII exemption and staff on a religious basis.")

9. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")

10. *Zelman v. Simmons Harris*, 536 U.S. 639 (2002).

11. *Id.*